Court of Errors and Appeals reversed this decision with the generous if unsound generalization that a public service company should be allowed to earn rates on the taxable value of its property, and the remark that private rather than government ownership of public utilities should be encouraged. There would seem to be no principle upon which the result of this case can be justified. If as a matter of fact a public service company deserves a greater income than that to be obtained by capitalizing the actual value of its property at the given rate of interest [16] and determining its rates accordingly, the proper method is to face the issue squarely and raise the rate of interest, rather than to pad the capital account with fictitious values. Any other method savors of intellectual dishonesty.

UNREGISTERED AUTOMOBILES AND TORT LIABILITY. — It has never been easy to reconcile, or even to disentangle, the theories which the Massachusetts Supreme Judicial Court has applied in determining the relation of illegal conduct to recovery in actions of tort. A recent decision adds perceptibly to the difficulty of the task. The defendant was the owner of an automobile, which was improperly registered. His son, with his assent, but not as his agent, took some friends for a ride in the car, and negligently injured the plaintiff. The court held that the father's failure to register the car according to law made him liable for the son's negligence. *Gould* v. *Elder*, 107 N. E. 59.

The historical background of the decision is complex. One group of cases, denying recovery for injuries sustained by travelers on Sunday who were not engaged in errands of mercy or of necessity, is now but a memory of the past, quaintly flavored with New England Puritanism.[1] The more modern Massachusetts law on the subject has its foundation in two cases decided some thirty years ago. One held that illegal conduct on the part of the defendant, where it is a contributing cause of the injury, does not of itself render him liable, but is merely evidence of his negligence.[2] In the other the plaintiff's violation of a traffic ordinance, directly contributing to his own injury, was held an absolute bar to his recovery.[3] With the advent of the automobile and the multiplication of

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[16] As to what is a proper rate of interest authorities differ. In the principal case a return of eight per cent was allowed upon the inflated valuation adopted by the court. Six per cent is a usual figure, and seven per cent was named as a proper return if the franchise "value" was not to be included, by Charles W. Needham, in his article on "Franchises," 15 COL. L. REV. 97.

[1] The Sunday law cases are collected in Smith *v.* Boston & Maine R., 120 Mass. 490. They have since been overruled by statute. R. L. c. 98, § 17. The theory of the cases has been criticised on the ground that it fails to distinguish between illegality which is a cause rather than a mere condition of the injury. See Sutton *v.* Wauwatosa, 29 Wis. 21; Johnson *v.* Irasburgh, 47 Vt. 28. The latter case, however, justifies the result where the defendant is a municipality, on the ground that no duty of care was owed to persons unlawfully on the highway.

[2] Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310. For a criticism of this view, see an article by Dean Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 321 ff.

[3] Newcomb *v.* Boston Protective Department, 146 Mass. 596, 16 N. E. 555. The court denied that there was any inconsistency in thus treating a plaintiff with greater

traffic regulations, however, these two theories seem to have been considered inadequate, and still a third view was adopted. Where the plaintiff's illegal conduct consisted in driving an unregistered car, recovery for an injury due to the defendant's negligence was denied, although failure to register the car in no way contributed to the injury, on the ground that the automobile laws made the car an outlaw on the highway.[4] This outlawry, it was subsequently established, embraces innocent passengers as well.[5] And it seems to have been assumed that it would not only bar the owner of the car as plaintiff, but make him liable regardless of due care as defendant.[6]

Here were three distinct theories of the relation of illegal conduct to tort liability. A fourth was soon to emerge. In the case of *Bourne* v. *Whitman*[7] the illegal element was the circumstance that the operator's license of the defendant had expired. The court held that this did not make the car an outlaw; but it said that the lack of an operator's license would be evidence of the driver's lack of skill in managing the car. This *dictum* is not easy to understand.[8] The lack of a license might under some circumstances be evidence of the general incompetence of the driver, where that is in issue, although as a rule the logical relevancy would be faint. This would perhaps explain the decision in a subsequent case, which held erroneous the refusal by the trial court to instruct that the fact that a chauffeur hired by the plaintiff had no license was evidence of the plaintiff's negligence.[9] But the rule as laid down in

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severity than a defendant, saying, by Knowlton, J., that "in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression, will receive no favor."

[4] Dudley *v.* Northampton St. Ry. Co., 202 Mass. 443, 89 N. E. 25. The decision is made to turn on the language of § 3 of the automobile laws (STAT. 1903, c. 473), providing that "except as otherwise provided herein no automobile or motor cycle shall . . . be operated upon any public highway . . . unless registered as above provided." It was said that the purpose of the statute was to protect travelers on the highway by giving them means of identifying an automobile which injures them, and that a car not so registered was a "forbidden and dangerous machine." In other jurisdictions this view has not been adopted, registration being regarded as a revenue measure, not designed to affect civil liability. Atlantic Coast Line R. Co. *v.* Weir, 63 Fla. 69, 58 So. 641; Hemming *v.* New Haven, 82 Conn. 661, 74 Atl. 892; Lockridge *v.* Minneapolis & St. L. Ry. Co., 140 N. W. 834 (Ia.). See 27 HARV. L. REV. 93.

[5] Feeley *v.* Melrose, 205 Mass. 329, 91 N. E. 366.

[6] The reasoning in Bourne *v.* Whitman, 209 Mass. 155, 95 N. E. 404, goes on this assumption. This would indicate that the doctrine is not so much that no duty of care is owed to a trespassing automobile, as that the operation of an unregistered car is legally so reprehensible that the illegality is equivalent to negligence. The language of the opinion in Dudley *v.* Northampton St. Ry. Co., *supra*, gives support to this view.

[7] *Supra*, n. 6.

[8] The court's position is indicated in the following extract from the opinion of Knowlton, C. J.: "If in any case the failure to have a license, looking to those conditions that ordinarily accompany the failure to have it, is a cause contributing directly to an injury, a violator of the law would be legally responsible to another person injured by the failure; or, if he is injured himself, would be precluded from recovery against another person who negligently contributed to the injury. But we are of opinion that his failure in that respect is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of the plaintiff, it is shown to be a contributing cause to the injury sued for, in which case it is a bar to recovery."

[9] Conroy *v.* Mather, 217 Mass. 91, 104 N. E. 487.

Bourne v. *Whitman* is that lack of the license is evidence of negligent management at the time of the accident. It seems unwise to violate the character rule to such an extent in favor of evidence which might tend strongly to prejudice the jury, and which in many cases can have almost no probative value.[10]

The ground of decision in the principal case does not fit easily into any one of these theories. If the outlaw doctrine, as extended to defendants, rests on some analogy to the liability of a landlord to third persons for a nuisance on land which existed at the time of the lease,[11] or to the absolute liability of the owner of a wild beast,[12] it logically justifies holding the father liable for any harm done while the car is in his son's hands.[13] The court considers him liable, however, only for his son's negligence. This would indicate that the liability depended on principles of *respondeat superior*, a view that seems hardly tenable. By no alchemy known to the courts can the mere fact of illegality make one in law an agent who is not an agent in fact.

IS *CESTUI QUE TRUST'S* RIGHT *IN REM* OR *IN PERSONAM?* — "An use is a trust or confidence reposed in some other which is not issuing out of the land but a thing collateral annexed in privity to the estate of the land and to the person touching the land." [1] So Lord Coke in 1628 defined the right of a *cestui que trust*, a definition which few lawyers of a century ago would have dared to dispute. But in recent times there has grown up a rapidly increasing expression of opinion both among judges and text-writers that the *cestui* has more than a bare "trust or confidence" in the trustee, that he has an interest in the *res* itself, real in nature and good against everyone save a *bonâ fide* purchaser of the legal title.[2]

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[10] As in Bourne *v.* Whitman, *supra*, where the driver's license had expired only the day before the accident and was renewed two days after.

[11] Dalay *v.* Savage, 145 Mass. 38, 12 N. E. 841.

[12] Filburn *v.* People's Palace, etc. Co., 25 Q. B. D. 258.

[13] In some jurisdictions the owner of an automobile who allows members of his family to take the car for a ride is held liable for their negligence, on some theory of agency growing out of the relationship. The cases are collected and criticised in 28 HARV. L. REV. 91. In these jurisdictions the problem of the principal case would not arise. But in Massachusetts this view is not adopted. Whether or not the driver of the car was an agent of the defendant is considered a question of fact in each case. See Bourne *v.* Whitman, 209 Mass. 155, 173, 95 N. E. 404, 408.

[1] Co. Lit. *272 b.*

[2] See Cave *v.* Cave, 15 Ch. D. 639, 647; Cory *v.* Eyre, 1 DeG. J. & S. 149, 167; Shropshire Railways, etc. Co. *v.* The Queen, L. R. 7 H. L. 496, 506, 512, 514. See SALMOND, JURISPRUDENCE, 3 ed., 230 *et seq.*; WILLOUGHBY, THE LEGAL ESTATE, ch. 1; Professor Pound in 26 HARV. L. REV. 462. Lord Mansfield's view of the nature of trusts in his dissenting opinion in Burgess *v.* Wheate, 1 Eden 177 (1759) is worthy of note (p. 226): "A use or trust heretofore was (while it was a use) understood to be merely an agreement by which the trustee and all claiming from him in privity were personally liable to the *cestui que trust*, and all claiming under him in like privity. Nobody in the *post* was entitled under or bound by the agreement. But now the trust in this court is the same as the land and the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be coextensive with the legal estate of the land, and where it is not declared it results by necessary implication; because the trustee is excluded except where the trust is barred in the case of a purchaser for valuable consideration without notice."